

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 4, 2002 Session

AIMEE GRACE CATHEY v. CITY OF DICKSON, ET AL.

Direct Appeal from the Chancery Court for Dickson County
No. 5767-98 Allen W. Wallace, Chancellor

No. M2001-02425-COA-R3-CV - Filed May 10, 2002

This appeal emanates from dismissal of Plaintiff's claims pursuant to Tenn. Code Ann. § 6-58-101, *et seq.* and Tenn. Code Ann. § 8-44-101, *et seq.* The trial court dismissed the case as moot after the annexation ordinance at dispute was repealed by the defendant City of Dickson. Plaintiff filed her notice of appeal, and the court below subsequently granted the City's Tenn. R. Civ. P. 60 motion to allow the City to amend its answer to include an affirmative defense to Plaintiff's constitutional claims. The case was again dismissed. We affirm dismissal, but vacate the order granting the City's Rule 60 motion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in part;
Vacated in part; and Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Tony L. Turnbow, Franklin, Tennessee, for the appellant, Aimee Grace Cathey.

Jerry V. Smith, Dickson, Tennessee, for the appellee, City of Dickson.

OPINION

This dispute began in September of 1998, when the City of Dickson (the City) passed an annexation ordinance to begin phase I of a 20-year, multi-phase plan to annex property within anticipated growth areas surrounding the City. Phase I of the plan included property that is generally southeast of the Dickson city limits. Plaintiff's (Ms. Cathey's) property, a hog farm situated near what is now the Highway 46-Interstate 40 interchange, was included in this ordinance. Ms. Cathey's property is located at the eastern edge of the annexation area.

Ms. Cathey opposed the annexation ordinance. She participated in public hearings and meetings at which the annexation issue was considered, expressing her strong objection to the potential annexation of her property. In December of 1998, Ms. Cathey commenced an action

pursuant to Tenn. Code Ann. § 6-58-101, *et seq.*, to challenge the ordinance. In November of 2000, she amended her complaint to include a claim that the City had violated the Tennessee Open Meetings Act codified at Tenn. Code Ann. § 8-44-101, *et seq.*, and that her constitutional rights had been violated.

Ms. Cathey alleges that the annexation ordinance was unreasonable and that it was not based on objective studies. She further contends that the Plan of Services submitted by the City contained no implementation schedule as required by statute, and that the City had no plans for providing services which it acknowledged were needed. She also alleges that the plan was discussed in private meetings in violation of Tenn. Code Ann § 8-44-101, *et seq.*, (the Open Meetings Act). On appeal, Ms. Cathey argues that the plan was invalid on its face and that the City was grossly negligent in devising and then not repealing the ordinance until months after her claim had been filed.

The City repealed the annexation ordinance on March 5, 2001, and the trial court granted Defendant's motion to dismiss on March 22. Ms. Cathey filed her notice of appeal in this Court on April 11. The City subsequently filed a Rule 60 motion for the order of the trial court to be set aside, and requested leave of the trial court to amend its answer to add an affirmative defense of the statute of limitations regarding Ms. Cathey's claim that her constitutional rights had been violated. On May 29, the trial court granted the City's motion and the City filed its amended answer and second motion to dismiss in August of 2001. The trial court granted the City's motion to dismiss on September 6, 2001, and Ms. Cathey again filed a timely notice of appeal.

Issues

Ms. Cathey submits the following issues for our review:

- (1) Whether the Trial Court erred in dismissing the action pursuant to T.C.A. § 6-51-103 (and in failing) to establish a time during which the Defendant should be prohibited from attempting to annex the Plaintiff's property when there was evidence of wrongdoing by the Defendant City.
- (2) Whether the Trial Court erred in dismissing Plaintiff's claim for attorney's fees and costs for the Defendant City's violation of her Civil Rights.
- (3) Whether the Trial Court erred in allowing the Defendant to amend its answer after the Trial Court had entered a final order dismissing the case and after Plaintiff had filed a Notice of Appeal.
- (4) Whether the Trial Court erred in dismissing the Plaintiff's Civil Rights action based upon the Statute of Limitations.

Standard of Review

A Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint itself. *Cook v. Spinnakers of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994). The grounds for such a motion is that the allegations of the complaint, if considered true, are not sufficient to constitute a cause of action as a matter of law. *Id.* A motion to dismiss should only be granted if “it appears that the plaintiff can establish no facts supporting the claim that would warrant relief.” *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999) (citing *Riggs v. Burson*, 941 S.W.2d 44, 47 (Tenn. 1997)). Accordingly, no presumption of correctness attaches to a trial court’s ruling on a motion to dismiss. *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997).

Dismissal of Tenn. Code Ann. § 6-51-103 Cause of Action as Moot

Tenn. Code Ann. § 6-51-101, *et seq.*, governs the annexation by a municipality of territory adjoining the City’s existing boundaries. The code provides, in pertinent part:

A municipality . . . upon its own initiative when it appears that the prosperity of such municipality and territory will be materially retarded and the safety and welfare of the inhabitants and property endangered, after notice and public hearing, by ordinance, may extend its corporate limits by annexation of such territory adjoining its existing boundaries as may be deemed necessary for the welfare of the residents and property owners of the affected territory as well as the municipality as a whole

Tenn. Code Ann. § 6-51-102(a)(1)(1998).

The code requires that “the governing body shall adopt a plan of services establishing at least the services to be delivered and the projected timing of the services. The plan of services shall be reasonable with respect to the scope of services to be provided and the timing of the services.” Tenn. Code Ann. § 6-51-102(b)(1)(1998). Section 102(b)(2) lists the minimum services to be included in such plan. Tenn. Code Ann. § 6-51-102(b)(2)(1998).

Section 6-51-103 provides that an owner of property within the annexation area may file suit challenging the annexation. The section reads:

Any aggrieved owner of property, lying within territory which is the subject of an annexation ordinance prior to the operative date thereof, may file a suit in the nature of a quo warranto proceeding in accordance with this part, § 6-51-301 and title 29, chapter 35 to contest the validity thereof on the ground that it reasonably may not be deemed necessary for the welfare of the residents and property owners of the affected territory and the municipality as a whole, and so constitutes an exercise of power not conferred by law.

Tenn. Code Ann. § 6-51-103(a)(2)(A)(1998). The municipality then has the burden of proving that the annexation is reasonable for the well-being of the communities involved. Tenn. Code Ann. § 6-51-103(b)(1998). If the court finds that the annexation ordinance is unreasonable or done by exercise powers not conferred by law, the ordinance must be vacated for at least 24 months following the date of the court's order. Tenn. Code Ann. § 6-51-103(c)(1998).

The filing of an action pursuant to this section stays the operation of the ordinance during the pendency of the proceedings. *City of Bluff City v. Morrell*, 764 S.W.2d 200, 201 (Tenn. 1988). However, an annexation ordinance that has not yet become operative can be repealed during the pendency of such a suit by an act of equal dignity. *Id.* at 202. The repeal of the ordinance through such an act has been held by this Court to render the pending proceeding moot. *State ex rel. Schaltenbrand v. City of Knoxville*, 788 S.W.2d 812, 813 (Tenn. Ct. App. 1989).

In this case, the trial court dismissed Ms. Cathey's cause of action challenging the City's annexation of her property after the City had repealed the annexation ordinance. Although the court's order does not specifically find the claim moot, both parties understand such a finding to be implicit in the order. We agree with this interpretation.

Ms. Cathey contends that the repeal of the annexation ordinance should not render her claim moot. She correctly submits that the 24-month prohibition against further annexation attempts provided by section 6-51-103(c) serves to discourage unreasonable annexation attempts. She further argues, however, that by repealing the ordinance the City implicitly acknowledged that the ordinance was unreasonable, and that she should therefore be allowed to prove that she is entitled to the 24-month prohibition against further annexation attempts. We disagree.

In *Schaltenbrand*, we noted that the statute does not provide a vested right to the 24-month prohibition once the ordinance has been repealed. *Id.* The 24-month prohibition is applicable only when the court has determined that the annexation ordinance was unreasonable. *Id.* We stated in *Schaltenbrand* that to force a City to continue such a suit despite the repeal of the ordinance would be a waste of judicial resources and would deprive the City of its power to repeal the ordinance. *Id.* We also held that the repeal of the ordinance does not imply an admission on the part of the City that the ordinance was in fact unreasonable and that the 24-month prohibition should therefore follow. *Id.*

Ms. Cathey argues that where the City has acted wrongfully in passing an annexation ordinance, as she alleges is the case here, it should not be able to avoid the punitive element of the statute simply by repealing the annexation ordinance. In *Schaltenbrand*, we noted that there is arguably an exception to the general rule that the repeal of the ordinance renders the action moot where the plaintiff alleges harassment on the part of the municipality. *State ex rel. Schaltenbrand v. City of Knoxville*, 788 S.W.2d 812, 815 (Tenn. Ct. App. 1989). (citing *King v.*

City of Bloomington, 159 N.E.2d 563 (1959); *Besso v. Town of Porter*, 432 N.E.2d 1380 (Ind. App. 1982)). The appellants in *Schaltenbrand* alleged that such harassment had occurred. *Id.* Upon review of the record in that case, however, we found that the evidence did not support such allegations. *Id.*

Ms. Cathey contends that the case at bar is distinguishable from *Schaltenbrand* because of several instances of “wrongdoing” on the part of the City. First, she argues that the City based the annexation ordinance not on objective studies, but on subjective individual opinions. Second, she alleges that several members of the City Council held private meetings to discuss the ordinance in violation of the Open Meetings Act as codified at Tenn. Code Ann. § 8-44-101, *et seq.* Third, she suggests deficiencies in the City’s plan of services for the annexation area. Finally, as we understand her argument, she claims that the City violated her constitutional rights by acting recklessly in passing the ordinance, thereby denying her due process and causing her to suffer a loss in the form of fees and costs incurred in bringing this claim. However, her complaint does not allege that the City either passed or repealed the ordinance in order to harass her, or that the ordinance was utilized for some retaliatory or otherwise wrongful purpose.

As noted above, the Code provides a 24-month prohibition against further annexation attempts only when the ordinance is judicially determined to be unreasonable. It is not a vested right, but one that vests only in limited circumstances. Once the ordinance is repealed, absent evidence of harassment, the *quo warranto* suit is moot. We find no reason to depart from the rule, or to appeal to the limited exceptions under which we may entertain a cause of action despite its mootness,¹ in this case. We accordingly affirm dismissal of the Tenn. Code Ann. § 6-51-101 claim.

Dismissal of Open Meetings Act Claim

The Open Meetings Act stipulates:

The general assembly hereby declares it to be the policy of this state that the formation of public policy and decisions is public business and shall not be conducted in secret.

Tenn. Code Ann. § 8-44-101(a)(1993).

The Act requires that, except as provided by the Constitution of the State of Tennessee, all meetings of any governing body must be public meetings and open to the public at all times.

¹In order to be justiciable, a cause of action must involve an actual case or controversy involving presently existing rights of parties who have a legally recognized interest in the outcome. A real controversy must exist at all stages of judicial review, and if the matter has been resolved the cause of action must be dismissed as moot. *See County of Shelby v. McWhorter*, 936 S.W.2d 923, 931 (Tenn. Ct. App. 1996). Exceptions are made to this doctrine for issues of important public interests that are likely to arise frequently or which must necessarily become moot before they can be decided. *See Dockery v. Dockery*, 559 S.W.2d 952, 955 (Tenn. Ct. App. 1977).

Tenn. Code Ann. § 8-44-102(a)(Supp. 2001). Section 8-44-103 provides that public notice must be given of such meetings, and section 8-44-104 mandates that there shall be no secret voting by the governing body. Section 8-44-105 states:

Any action taken at a meeting in violation of this part shall be void and of no effect; provided, that this nullification of actions taken at such meetings shall not apply to any commitment, otherwise legal, affecting the public debt of the entity concerned.

Tenn. Code Ann. § 8-44-105(1993). Accordingly, in this case, repeal of the annexation ordinance would have been the statutory remedy had the Open Meetings Act been violated. As the ordinance has been repealed, this issue is also moot. Dismissal of this issue is affirmed.

Dismissal of Civil Rights Claim

Ms. Cathey contends on appeal that the trial court erred by dismissing her civil rights claim. We first note that Ms. Cathey's amended complaint alleges a violation not of her civil rights, but of "constitutional rights." The complaint refers to no particular constitutional right, however. Her argument on appeal to this Court is that the City acted with "gross negligence or deliberate indifference [when] it refused to repeal the ordinance until after the Plaintiff had suffered significant monetary loss" and that "she was denied due process and suffered a loss as a result." As we understand it, Ms. Cathey's argument is that the City violated her constitutional rights because it unreasonably passed the annexation ordinance, allegedly in violation of the Open Meetings Act, and then failed to repeal it until after she had suffered the expenses of pursuing a lawsuit. In her amended complaint, Ms. Cathey prays "[f]or a judgment against the Defendant City of Dickson for attorney's fees and costs for violating the Plaintiff's constitutional rights and the Tennessee Open Meetings Law T.C.A. 8-44-101 et seq." This is the only reference to constitutional rights contained in the complaint.

This vague reference in Ms. Cathey's complaint is not sufficient to constitute a claim for relief. The Tennessee Rules of Civil Procedure stipulate that a cause of action is commenced with the filing of a complaint. Tenn. R. Civ. P. 3. The complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Tenn. R. Civ. P. 8.01. Rule 8.05 (1) requires that "a pleading shall be simple, concise and direct." The primary function of the pleadings is to give notice of a claim or a defense. Robert Banks, Jr. & June F. Entman, Tennessee Civil Procedure § 5-1(a)(1999). The rules further require that when a claim relies upon a statute, it must "refer to the statute or state all of the facts necessary to constitute such breach *so that the other party can be duly apprised of the statutory violation charged.*" Tenn. R. Civ. P. 8.05(1)(emphasis added). While Ms. Cathey does not rely upon a statute in her claim, we believe that the spirit of rule requires similar specificity when a claim relies on a constitutional provision. Ms. Cathey's complaint is insufficient to give the City notice of the claim asserted against it.

Ms. Cathey's argument to this Court that she has been denied due process is unconvincing. The evidence in this case is that Ms. Cathey received the full measure of process due her to challenge the annexation ordinance and to assert her Open Meetings Act claim. When the City repealed the annexation ordinance by an act of equal dignity, Ms. Cathey's causes of action under Tenn. Code Ann. § 61-51-101, *et seq.* and Tenn. Code Ann. § 8-44-101, *et seq.* were rendered moot.

We are sensitive to the fact that Ms. Cathey has incurred considerable expense in bringing her claim and this appeal. However, such expenses are a foreseeable element of any lawsuit. The fact that the cause of action generating such expenses is against a governmental entity is not sufficient to render it a constitutional claim. We accordingly find this issue to be without merit.

Order of the Trial Court Allowing the City to Amend its Answer

Ms. Cathey argues on appeal that it was error for the trial court to grant the City's Rule 60 motion after her appeal had been filed. We agree. We note that both the City's motion and the order of the trial court granting that motion refer only to Rule 60. Since the motion does not pertain to a clerical error, we regard it as a Rule 60.02 motion.

Jurisdiction of the appellate court attaches with the filing of a notice of appeal. *State v. Givhan*, 616 S.W.2d 612, 613 (Tenn. Crim. App. 1981). A trial court has no jurisdiction to consider a Rule 60.02 motion when an appeal is pending. *Spence v. Allstate Ins. Co.*, 883 S.W.2d 586, 596 (Tenn. 1994). Once an appeal has been filed, a party seeking relief from a judgment must request an order of remand from the appellate court. *Id.* Since Ms. Cathey had filed her appeal before the City filed its Rule 60 motion, the trial court lacked jurisdiction to consider the City's motion. An order issued by a court lacking jurisdiction over the subject is void as a nullity. *Gillespie v. State*, 619 S.W.2d 128, 129 (Tenn. Ct. App. 1981). Therefore, the order of the trial court granting the City's Rule 60 motion is vacated.

Given the circumstances surrounding the motion in this case, we believe it is important to note that, notwithstanding the jurisdictional limitations, this was an improper use of Rule 60.02. The rule provides:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment.

Tenn. R. Civ. P. 60.02.

Although whether to grant a Rule 60 motion is within the sound discretion of the trial court, Rule 60.02 has been narrowly construed by the courts of this State. *Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94, 97 (Tenn. 1993). The Tennessee Supreme Court has opined that “[i]t is to be invoked only in cases of overwhelming importance, or those involving extraordinary circumstances or extreme hardship.” *Id.* Rule 60.02 acts as an “escape valve” from inequity or injustice. *Id.* (citing *Toney v. Mueller Co.*, 810 S.W.2d 145 (Tenn. 1991)). It serves to balance the requirements of justice against the principle of finality. *Banks v. Dement Constr. Co.*, 817 S.W.2d 16, 18 (Tenn. 1991). Accordingly, this escape valve should not be easily opened. *Id.*

In *Banks*, the Tennessee Supreme Court refused to allow Rule 60.02 to be utilized to save a party’s claim from the running of the statute of limitations. *Id.* The Court noted that Rule 60.02 cannot be utilized to save a party from choices he has deliberately made, or to protect a party who has failed to protect his own interests. *Id.* at 19. It cannot be invoked to allow a party to amend his answer after a final judgment has been rendered merely because he failed to assert an affirmative defense or to answer an element of a claim. The rule is not a quick fix for a party’s own error, but a corrective device to be sparingly employed to avoid injustice.

Conclusion

We vacate the order granting the City’s Rule 60 motion. Claims pursuant to Tenn. Code Ann. § 6-51-101, *et seq.* and Tenn. Code Ann. § 8-44-101, *et seq.* were rendered moot when the annexation ordinance was repealed. Dismissal of this case is affirmed. Costs of this appeal are taxed to the appellant, Aimee Grace Cathey, and her surety, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE